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ABSTRACT

This paper examines several United States Supreme Court decisions to evaluate the Court's stance on an individual's right to privacy when that right conflicts with the press right to freedom of expression. Particular attention is paid to the Court's "Rosenbloom" and "Gertz" decisions. The paper concludes that the Supreme Court is trying to accommodate both individual and press rights as equivalent yet distinct liberties, and that the Court interprets the law of privacy and the law of defamation as being distinct from one another. (RL)

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The Supreme Court
on
Privacy and the Press

by

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"Where matters are in flux. . . it is more important to re-think past conclusions than to adhere to them without question. . . ."

Justice Harlan[1]

During its 1974-1975 term, the United States Supreme Court issued two decisions on privacy and the press, Cantrell v. Forest City Publishing Co.[2] and Cox Broadcasting Corp. v. Cohn.[3] Prior to that term, it had issued only one decision--Time, Inc. v. Hill (1967)[4]--involving privacy and the press.[5] In the Cox decision the Court shifted from the position it had taken in Time: whereas Time gave preferred status to freedom of the press, in Cox a majority of the Court emphasized the importance of protecting both freedom of expression and privacy. Similarly, in the defamation area the Court has departed from Rosenbloom v. Metromedia (1971),[6] in which preferred status was given to freedom of the press: in Gertz v. Welch (1974)[7] the Court emphasized the importance of protecting both freedom of expression and right to reputation.

Supreme Court privacy and defamation decisions have at times followed similar lines of development. The Court has used parallel lines of reasoning in these areas, without merging privacy and defamation law. Two important defamation decisions, Rosenbloom and Gertz, will be considered in this monograph for the following reasons: first, since Time and Cantrell involve the "false light" invasion of privacy, they are closely related

to defamation;[8] second, Time and Rosenbloom share the same conceptual basis; and third, since Gertz refutes the conceptual basis of Rosenbloom, the conceptual basis of Time can be questioned.[9]

Following a brief description of the cases, these questions will be answered:

1) Has the Supreme Court attempted to provide equipollent protection for the right of privacy (or right of reputation in defamation cases) and the right of freedom of expression, or does it accord one right preferred status over the other?
2) Has the Supreme Court attempted to merge the law of privacy and defamation?

After consideration of these questions, the Supreme Court's most recent decision on privacy and the press, Zacchini v. Scripps-Howard Broadcasting Co.,[10] will be discussed.[11]

Case Background

On September 11 and 12, 1952, James Hill and his family were held hostage in their Whitemarsh, Pennsylvania home by three escaped convicts. The family was released unharmed, and in an interview with newsmen, Hill emphasized that there had been no violence and that the convicts had been courteous to the family.[12] In 1953, Random House published The Desperate Hours, a novel by Joseph Hayes about the "Hilliard" family being held hostage in their home by escaped convicts. However, unlike the Hills, the Hilliards were subject to violence and verbal sexual insult. The Desperate Hours was transformed into a motion picture and play, and in February 1955, Life magazine

published an article entitled "True Crime Inspires Tense Play," which asserted that the play depicted the Hill's experience. The photographs accompanying the article showed violence and escape attempts.

Hill brought an action for invasion of privacy under the privacy provisions of the New York Civil Rights Law,[13] alleging that Life knew the play did not mirror the experience of the Hill family.[14] Time, Inc., publisher of Life, defended the article, stating that it dealt with a "subject of general interest and of value and concern to the public" and that it was "published in good faith without any malice. . . ."[15]

The judge instructed the jury that liability must be based on a finding of "fictionalization." The jury awarded Hill $50,000 compensatory and $25,000 punitive damages, and on appeal the Appellate Division of the New York Supreme Court sustained the liability verdict but ordered a new trial to determine damages.[16] At the new trial, Hill was awarded $30,000 compensatory damages without punitive damages. The New York Court of Appeals affirmed the compensatory damages award,[17] but on appeal to the U.S. Supreme Court the decision was reversed and remanded for further proceedings.[18]

Justice Brennan's majority opinion clearly echoed the majority opinion he wrote in New York Times Co. v. Sullivan,[19]

> Factual error, content defamatory of. . . reputation, or both, are insufficient for an award of damages for false statements unless actual malice--knowledge that the statements are false or in reckless disregard of the truth--is alleged and proved.[20]

Brennan then stated:

> We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false matters of public interest [emphasis added] in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.[21]

Thus, in the Time, Inc. v. Hill[22] decision, the Supreme Court applied the New York Times malice standard to a privacy case.[23] Shortly after the Time decision was issued, the Supreme Court extended the scope of the New York Times malice standard in defamation cases to include public figures.[24] In June 1971, in Rosenbloom v. Metromedia,[25] a plurality of the Court further extended the New York Times standard in defamation cases to include matters of "public interest," regardless of whether the plaintiff was a "public official," a "public figure," or a "private individual."

In October 1963, George Rosenbloom, a nudist magazine distributor, was arrested for selling "obscene" literature. Subsequently he sought an injunction in Federal District Court prohibiting police interference with his business and further publicity of his arrest. Reporting on the arrest and the suit, radio station WIP, owned by Metromedia, characterized Rosenbloom as a peddler of girlie books and smut literature and quoted a police official who described the material Rosenbloom distributed as obscene.[26] When a jury in state court acquitted Rosenbloom of the criminal obscenity charges in May 1964,[27] he filed a diversity action for libel in United States District Court for the Eastern District of Pennsylvania, alleging that WIP's

characterization of him as a smut peddler was false and that the description of his books and magazines as obscene was libel per se. WIP's defenses at the trial were truth and privilege.[28]

The jury returned a verdict for Rosenbloom and awarded him $25,000 general damages and $725,000 punitive damages. The punitive damages were reduced by the District Court on remittur to $250,000.[29] The New York Times standard was inapplicable in this case, the District Court held, because Rosenbloom was neither a "public official" nor a "public figure." The Court of Appeals for the Third Circuit reversed, holding that the New York Times standard was applicable and that the fact that Rosenbloom was not a public figure "cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented."[30]

Though affirming, the Supreme Court was sharply divided. Justice Brennan in an opinion which Chief Justice Burger and Justice Blackmun joined, stated:

> We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[31]

The application of the New York Times standard in defamation cases involving matters of public interest presented by the Rosenbloom plurality was superseded by new rules regarding defamation when the Supreme Court issued its Gertz v. Welch decision in June 1974.[32]

This decision marked a shift in the Court's approach to defamation, eliminating strict liability but placing requirements upon the plaintiff before actual and punitive damages could be awarded.

Elmer Gertz, a reputable attorney, was falsely portrayed in American Opinion, a magazine of the John Birch Society, as a "Leninist," "Communist-fronter," and a former official of a Marxist group.[33] The editor of American Opinion made no attempt to check the accuracy of these statements. In a diversity action for libel in the United States District Court for the Northern District of Illinois, Gertz attempted to prove that the editor had acted with knowledge that the statements were false, or with reckless disregard of whether they were false or not. The publishers of American Opinion argued that Gertz was a "public figure" and that the New York Times standard should apply to this case.[34] The District Court denied that Gertz was a "public figure." However, foreshadowing the reasoning of the plurality of the Supreme Court in Rosenbloom, it concluded that the New York Times standard protected "discussion of any public issue without regard to the status of the person defamed therein."[35]

Gertz appealed to the Court of Appeals for the Seventh District and contested the applicability of the Times standard to his case. The Court of Appeals, citing the Supreme Court's intervening decision in Rosenbloom, affirmed the District Court's decision to apply the Times standard to this case. After reviewing the record, the Court of Appeals also agreed

with the District Court that Gertz had failed to show by clear and convincing evidence that American Opinion had acted with actual malice.[36]

Upon review, a majority of Supreme Court justices stated that both the District Court and Court of Appeals had "correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."[37] Citing St. Amant v. Thompson,[38] the Supreme Court held that to meet the actual malice standard, a plaintiff must show that a publisher has acted with a "high degree of awareness. . . of probable falsity."[39] However, the Supreme Court reversed the lower courts and held that the New York Times standard was inapplicable in a case involving a private individual, even though the defamatory statements concerned an issue of public or general interest. In addition, the Court placed restrictions on recovery of punitive damages, which require that actual malice be proven by clear and convincing evidence before punitive damages can be awarded.[40]

The Gertz decision brought the Time, Inc. v. Hill decision into question.[41] The Court in Gertz had refuted the "public or general interest" requirement for application of the New York Times standard in defamation cases, suggested by the plurality in Rosenbloom. Was the "public or general interest" requirement adopted in Time also invalid? The Court has not always been clear on the distinctions between defamation and "false light" invasions of privacy.[42] One of the two post-Gertz, press/privacy cases--Cantrell v. Forest City Publishing--[43]

presented the Court with the opportunity to refute the Time "public or general interest" requirement in light of Gertz, or to uphold the Time requirement and allow false light privacy and defamation to develop as two distinct lines of law.

After Melvin Cantrell's accidental death in December 1967, when a bridge collapsed, a feature article on the impact of the death on the Cantrell family was prepared by Joseph Eszterhas. Accompanied by Richard Conway, a photographer, Eszterhas went to the Cantrell home and talked with the Cantrell children while Margaret Cantrell, Melvin's widow, was not present.

Eszterhas' story appeared in the Cleveland Plain Dealer Sunday Magazine on August 4, 1968, and stressed the Cantrells' abject poverty. The story contained a number of inaccuracies, the most blatant of which was perhaps the following:

> Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. She says that after it happened, the people in town offered to help them out with money and they refused it take it.[44]

Margaret Cantrell and four of her children subsequently brought a diversity of citizenship action for invasion of privacy against Forest City Publishing, publisher of the Plain Dealer, as well as Eszterhas and Conway, in United States District Court for the Northern District of Ohio. The District Judge struck all claims for punitive damages on grounds of a lack of evidence that the false light portrayal was done "maliciously."[45] However, the District Judge instructed

the jury that liability for compensatory damages could be imposed if the article had been published with knowledge of falsity or in reckless disregard of the truth. The jury found each of the defendants liable for compensatory damages: on appeal the Court of Appeals for the Sixth Circuit reversed, holding that the publisher had not acted with knowledge of falsity or with reckless disregard of the truth.[46]

On certiorari the United States Supreme Court reversed and remanded, "with directions to enter a judgment affirming. . . the District Court. . . ."[47] Justice Stewart in an opinion in which eight other members of the Court joined, stated that many of Eszterhas' statements were "calculated falsehoods" and that the jury had been justified in finding that "Eszterhas had portrayed the Cantrells in a false light through knowing or reckless untruth."[48]

In considering the Cantrell case, the Supreme Court stated that since the District Judge (in contrast to the judge in Time, Inc. v. Hill) had instructed the jury that liability could be imposed only if actual malice was found,[49]

> . . . this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private [emphasis added] individual under false-light theory of invasion of privacy or whether the constitutional standard announced in Time, Inc. v Hill applies to all false-light cases. Cf. Gertz v Welch, Inc. . . Rather, the sole question that we need decide is whether the Court of Appeals erred in setting aside the jury's verdict.[50]

By deciding Cantrell on narrow grounds, the Court had refused to invalidate Time in light of Gertz, and was allowing false

light privacy law to develop along a different line than defamation law.

Later in the 1974-1975 term, the Supreme Court issued its decision in Cox Broadcasting Corp. v. Cohn;[51] though this case did not involve "false light" invasion of privacy, it provided the Court with another opportunity to address the distribution of protections of privacy and freedom of speech,[52] and to consider the impact of Gertz on privacy cases.[53]

Cynthia Cohn, Martin Cohn's seventeen-year-old daughter, was raped and suffocated in August 1971. Due to a Georgia statute that makes it a misdemeanor to disclose the identity of a rape victim, the original press coverage of the crime did not reveal Cynthia's name.[54] Six juvenile boys were indicted for the rape; Tom Wassell, a newsman for WSB-TV (owned by Cox Broadcasting), was present at their appearance in court on April 10, 1972. During a recess, Wassell was shown the indictments, which clearly showed the name of Cynthia Cohn, by the clerk of the court. Later that day, Wassell broadcast a news report of the proceedings over WSB-TV, identifying Cynthia Cohn as a rape victim.[55]

Martin Cohn brought an action against Cox Broadcasting in Superior Court of Fulton County, Georgia, alleging that his privacy had been invaded by the dissemination of his deceased daughter's name. Cox Broadcasting's defense was that the broadcast was privileged under the First and Fourteenth Amendments.[56] The Superior Court held that the rape identification statute gave a civil remedy to those injured by its violation. On appeal

the Georgia Supreme Court initially held that the Superior Court had erred in construing the statute to extend to a civil cause of action for invasion of privacy.[57] On a motion for rehearing, the Georgia Supreme Court held that the statute was a "legitimate limitation on the right of freedom of expresion."[58]

On appeal the United States Supreme Court reversed. In an opinion written by Justice White and joined by five other members of the Court, it held,

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.[59]

The "interests in privacy," the Court held, "fade when the information involved already appears on the public record."[60] As the following section will show, the Cox decision is significant: in it a majority of the Court expressed the need to balance the competing interests in a press/privacy conflict differently than the majority of Time, Inc. v. Hill.[61]

Equipollent Protection or Preferred Status?

In this section each of the decisions will be analyzed according to whether the Court attempted to provide equipollent protection for the right of privacy (or protection from defamation) and freedom of expression, or gave preferred status to one right. The Court's position in Cox Broadcasting Corp. v. Cohn[62] broke sharply from its earlier position in Time, Inc. v. Hill.[63]

Justice Brennan's majority opinion in Time, Inc. v. Hill[64] clearly places "primary value on freedom of speech and of press."[65]

Using James Madison's assertion that "some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in the press. . .,"[66] Brennan argued that erroneous statements are inevitable. Quoting his decision in New York Times Co. v. Sullivan, he asserted that such statements, without malice, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need. . . to survive. . . .'"[67]

By rejecting a negligence standard for liability and imposing the actual malice standard, Time made it difficult for a private individual to recover damages for false light invasion of privacy in matters of public interest. The difficulty of recovery is a deterent to litigation, thus increasing "breathing space" for press freedom.[68]

The "absolutists," Black and Douglas, concurred with the majority. Although they believed that the actual malice standard abridged freedom of the press, they joined the Court's opinion "in order to make possible an adjudication that controls this litigation."[69] Black warned against weighing conflicting values, arguing that the First Amendment was designed to "guarantee the press a favored spot in our free society."[70] He stated:

> The First Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unrepealed. If judges have, however, by their own fiat today created a right of privacy equal [emphasis added] to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms.[71]

In his separate concurring opinion, Justice Douglas argued that state attempts to restrict freedom of the press are barred by the First and Fourteenth Amendments "where the discussion concerns matters in the public domain."[72] When a person's activities are in the "public domain," Douglas stated, such "privacy as a person normally has ceases. . . ."[73]

Justice Harlan's opinion, concurring in part and dissenting in part, disagreed with the application of the New York Times actual malice standard to this case. He preferred instead a negligence standard for determination of liability.[74] A more limited "breathing space" for freedom of expression, he stated, was needed in this case than in those which involved public officials.[75] The First Amendment, he stated, "cannot be thought to insulate all press conduct from review and responsibility for harm inflicted;" liability should exist when private individuals "powerless to protect themselves" were "involuntarily exposed. . . ."[76]

Justice Fortas, joined by Chief Justice Warren and Justice Clark in a dissenting opinion, forcefully argued that privacy is a basic right and that the First Amendment does not preclude protection of the right of privacy: "There are great and important values in our society," he stated, "none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and attention. Among these is the right to privacy. . . ."[77]

"Perhaps the purpose of the decision," Fortas stated, "is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults. . . ."[78] Fortas argued that the Court had an important responsibility in protecting the individual's right to privacy, as well as freedom of the press:

> The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law. . . . For this Court totally to immunize the press. . . would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages. . . .[79]

A majority of the Court in Time, Inc. v. Hill[80] gave preferred status to rights guaranteed by the First Amendment over the right over privacy. Justice Harlan's opinion, although concurring in part, agreed with Fortas' dissent that a limited breathing space for freedom of expression should exist when the rights of private citizens are violated. This idea is central to the Gertz decision, which refuted the Rosenbloom plurality.

In the Rosenbloom decision as in the Time decision, only a minority of the Court was concerned with not weighting the scales "so heavily in the direction of press freedom"[81] Justice Brennan's plurality opinion in Rosenbloom v. Metromedia,[82] like his opinion in Time, extended the press a protection which gave freedom of expression preferred status over the individual's

protection from defamation. By extending the New York Times actual malice standard to all defamation cases concerning matters of public interest, the plurality maintained the "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[83] which was first stated in New York Times Co. v. Sullivan.[84]

In Rosenbloom, as in his earlier opinions in the New York Times and Time decisions, Brennan was concerned with providing adequate "breathing space" for First Amendment freedoms. He rejected the need to provide equipollent protection for freedom of expression and right of reputation:

> society's interest in protecting individual reputation often yields to other important goals. In this case, the vital [emphasis added] needs of freedom of the press and speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate "breathing space" for these great freedoms.[85]

In a short concurring opinion, Justice Black agreed that the First Amendment protects all discussion of matters involving public or general concern. He added that the Court should abandon "New York Times Co. v. Sullivan and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments."[86]

Justice White also concurred but refused to join any of the opinions because "each decides broader constitutional issues and displaces more state libel law than is necessary for the decision in this case."[87] The plurality was proceeding on too broad a front, he believed. Though he wanted to insure "that

effective communication which is essential to the functioning of our free society," he did not believe that state libel laws concerning private citizens had "caused the press to tread too gingerly in reporting 'news' concerning private citizens. . . or that the reputation of private citizens has received inordinate protection from falsehood."[88]

White's opinion, while concurring, stands in the middle of the spectrum of opinions issued in Rosenbloom. On the one hand, he disagreed with the plurality's extension of New York Times: discussion of Rosenbloom's arrest, due to the involvement of public servants, was protected by New York Times, without extending its scope. On the other hand, he disagreed with Justices Harlan and Marshall, who proposed eliminating strict liability. His dissenting opinion in Gertz, as will be shown, disagreed with eliminating strict liability and stressed the need to protect reputation.

In a dissenting opinion, Justice Harlan argued for greater protection of the private individual from defamation. He believed state libel law provided a countervailing interest that existed in tension with federal constitutional protection of freedom of the press. However, where "the purpose and effect of the law are to redress actual and measurable injury to private individuals that was reasonably foreseeable as a result of the publication," he stated, "there is no necessary conflict with the values of freedom of speech."[89] Though Justice Harlan left the Court before the Gertz case, his dissent in Rosenbloom foreshadowed the majority position in Gertz. He stated, "The States should be free to define for themselves the applicable

standard of care so long as they do not impose liability without fault. . . ."[90]

Of the Rosenbloom opinions, Justice Marshall's dissent expressed the most concern for protecting both conflicting values. He declared that protection of reputation from "wrongful hurt" is a concept at the "root of any decent system of ordered liberty."[91] On the other hand, he added that a "free and unfettered press is also basic to our system of ordered liberty. Here two essential and fundamental values conflict."[92]

Justice Marshall believed that the plurality erred in extending the New York Times actual malice standard in defamation cases involving matters of public interest because it offered inadequate protection for both conflicting values. The appropriate resolution of the "clash of societal values" in defamation cases involving private citizens, he believed, involved restricting "damages to actual losses."[93] This would eliminate the self-censorship that results from the fear of large punitive awards, while the "interest in protecting individuals from defamation will still be fostered" by compensating them for their actual losses.[94]

Thus in Rosenbloom as in Time, only a minority of the Court was concerned with providing equipollent protection for the conflicting values. In contrast, the majority in Gertz v. Welch[95] attempted to provide a "more equitable boundary between the competing concerns. . . ."[96] The essence of Justice Powell's majority opinion in Gertz was that preferred status for either freedom of expression or protection of reputation

was inappropriate in defamation cases involving private individuals.

"Some tension necessarily exists," Powell stated, "between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[97] Protection of the First Amendment must be broad, but the "need to avoid self-censorship by the news media is. . . not the only societal value at issue."[98] He indicated that the Rosenbloom plurality had failed to achieve the "proper accommodation" between the competing values for two reasons:

> On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times. . . . On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to assure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.[99]

By eliminating strict liability and requiring proof of actual malice before punitive damages could be awarded, the Gertz majority was attempting to provide adequate breathing space for expression. But by also allowing a private individual to recover actual losses without meeting the New York Times standard, the Court was offering greater protection for reputation than it had with the Rosenbloom plurality.

Justice Blackmun, who joined Justice Brennan and Chief Justice Burger in the Rosenbloom plurality opinion, concurred with the majority in Gertz. Blackmun joined the attempt to

"strike a balance between competing values" for two reasons:[100] first, by removing the specters of presumed and punitive damages in absence of New York Times malice, he believed that the Court eliminated "powerful motives for self-censorship" and provided "adequate breathing space for a vigorous press;"[101] secondly, he felt that it was important for the Court to have a "clearly defined majority position that eliminates the unsureness engendered by Rosenbloom's diversity."[102]

Chief Justice Burger, who as mentioned above, joined the Rosenbloom plurality, issued a dissenting opinion in Gertz. He preferred to "allow this area of law to continue to evolve as it has up to now. . . ."[103] Justice Douglas also dissented, stating that any attempt to "accommodate" the competing interests in this area was "hopeless" because the protections of the First Amendment are absolute.[104]

In a dissenting opinion, Justice Brennan adhered to the views he expressed in Rosenbloom, stating that the majority in Gertz did not provide adequate "breathing space" for freedom of expression.[105] Justice White also issued a dissenting opinion, but for reasons very different from the others: he believed that the majority opinion deprecated "the reputation interest of ordinary citizens" and argued, as in his Rosenbloom dissent, that too much state libel law was being invalidated.[106]

"Freedom and human dignity and decency are not antithetical," White declared. "Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to overwhelm the other."[107]

The Gertz case, he claimed, "ultimately comes down to the importance the Court attaches to society's 'pervasive. . . interest in preventing and redressing attacks upon reputation . . . .'"[108] By requiring the plaintiff to "prove. . . culpability. . . and actual damage to reputation,"[109] the Court "denigrates that interest. . . ."[110]

Nevertheless, the Gertz decision does provide more protection for the private individual's reputation that did the Rosenbloom plurality. Freedom of expression was not given the preferred status in Gertz which it had in Rosenbloom, and a more "equitable boundary between the competing concerns" was achieved.[111]

In marked contrast to the Gertz decision, the Cantrell v. Forest City Publishing Co.[112] decision, issued six months later, contains no discussion of the need to provide equipollent protection for the competing values. Neither did the Court consider, in light of Gertz, whether compensatory damages may be awarded in "false-light" privacy cases under a "more relaxed standard of liability" than the New York Times actual malice standard.[113] The Cantrell decision also contrasts with the Cox decision, issued three months later because it contains no discussion of the importance of a right of privacy.[114]

Nevertheless, the majority opinion in Cantrell, written by Justice Stewart and joined by seven other members of the Court, affirms an award for invasion of privacy where press conduct is egregious. However, the decision is cast within the basic framework set by the Time decision, which conditioned awards upon proof of the New York Times actual malice standard. If the

Court had agreed with the Court of Appeals, it would have taken a giant step by extending the protection of the First Amendment to "calculated falsehoods."[115] By affirming the District Court's judgment, the Court decided the case on narrow grounds that did not require reconsideration of the framework of Time in light of Gertz.[116]

In the only dissenting opinion in Cantrell, Justice Douglas stated that he would adhere to the views expressed in his concurring opinion in Time and affirm the judgment of the Court of Appeals. He argued that in "matters of public import. . . there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized."[117]

Though Martin Cohn's claim that his privacy had been invaded was not upheld by the Supreme Court in Cox Broadcasting Corp. v. Cohn,[118] the majority opinion, written by Justice White, clearly expressed a willingness to accommodate the competing interests in an appropriate press/privacy case in a fashion quite different from the Time decision.[119]

As in earlier decisions where the rights of the press conflicted with defamation law or right to fair trial,[120] the Court stressed the importance of press coverage of the actions of government:

> . . . in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of

> government operations. Without the information provided by the press most of us. . . would be unable to vote intelligently. . . .[121]

However, Justice White also stated that "powerful arguments can be made, and have been made, that however it may be defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press. . . ."[122] There are "impressive credentials"[123] for a right of privacy, he stated, and in "the collision between claims of privacy and those of a free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."[124] The tone of White's opinion, like that of Fortas' dissent in Time, is cautious, expressing the importance of both freedom of expression and privacy. His opinion recognizes the need to prevent the protections of one value from abusing the other, a significant shift from the tone of the majority opinion in Time.[125]

Of the separate opinions, Justice Rehnquist's dissent was concerned solely with matters of jurisdiction, and Justice Douglas' brief concurrence stated that "there is no power on the part of Government to suppress or penalize the publication of 'news of the day.'"[126] Justice Powell also concurred but focused on an interpretation of Gertz. Because his opinion sheds light on the validity of Time, it will be discussed in the following section.

Merger of Privacy and Defamation?

William Prosser in an important article on privacy, stated that in both "false light" and "public disclosure" privacy cases the "interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation."[127] This section will assess whether the Supreme Court, in the cases under discussion has attempted to merge the law of defamation and privacy.

In his majority opinion in Time, Justice Brennan referred to Prosser's assertion and then commented:

> Many "right of privacy" cases could in fact have been brought as "libel per quod" actions. . . . Although not usually thought of in terms of "right of privacy," all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the "right of privacy" cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.[128]

Justice Brennan was not the first member of the Court to recognize the similarities between defamation and privacy. In Rosenblatt v. Baer, a defamation case, Justice Stewart discussed protection of reputation as an aspect of "private personality" reflecting "our basic concept of the essential dignity and worth of every human being."[129] Stewart's language was virtually identical to that which Warren and Brandeis used in their seminal article on privacy in 1890.[130]

While recognizing the similarities between the two torts, Justice Brennan stated in Time that there was a strong difference between defamation and invasion of privacy. "Were this a libel

action," he stated, the opportunity of the individual "to rebut defamatory charges might be germane."[131] In a privacy case, the individual's rebuttal through channels of public communication would only increase exposure, making rebuttal inapposite.[132]

When the Court applied the New York Times actual malice standard to privacy in Time, it was not attempting to merge privacy law with that of defamation. Justice Powell writing in Gertz stated that the Time decision "was not an extension of New York Times but rather a parallel line of reasoning. . ." applied to an analagous value conflict.[133] Justice Brennan stated in Time:

> We find applicable here the standard of knowing or reckless falsehood, not through blind application of New York Times Co. v Sullivan. . . but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, we reach that conclusion only by applying these principles in this discrete context.[134]

The Court in Time was dealing for the first time with a false light invasion of privacy which presented a value conflict analagous to that of protection from defamation versus press freedom. Given the majority's overriding concern with protecting speech regarding matters of public interest,[135] application of a malice standard (in discrete context), which the Court found workable in the defamation area, is logical.[136]

Because the Court extended protection for press freedoms in the privacy area beyond the protection given in defamation

actions, it cannot be argued that privacy and defamation laws were merged in Time. A majority of the Court in Time gave preferred status to freedom of the press over privacy, and it was not until Rosenbloom that protection for the press in the defamation area extended to matters of "public interest."

Central to the Rosenbloom plurality opinion is the concept that when involved in an event of "public or general interest," the individual's interest in reputation (similar to privacy in Time) must succumb to society's interest in freedom of the press. Just as Time utilized the malice standard developed in the defamation area, Rosenbloom utilized a test of "public interest" first proposed by Warren and Brandeis.[137] Brennan's plurality opinion attributes the term "public interest" to Warren and Brandeis,[138] and applies to the defamation context their position that no protection for privacy should exist where publication concerns matters of public interest.[139]

The plurality's position was that the subject matter, not the status of the plaintiff, should determine application of the New York Times standard; a key aspect of this position was that both "public" and "private" individuals face substantially the same problem in rebutting defamatory material. The plurality was not holding, as would be appropriate in a privacy case, that rebuttal would be inapposite, but that "the ability to respond through the media" for public officials and figures depends "on the same complex factor on which the ability of the private individual depends: the unpredictable event of the media's continuing interest in the story."[140]

Although the core of the plurality opinion was derived from Warren and Brandeis, the plurality was not attempting to merge privacy and defamation. Rather, it was borrowing from a related area, using what could be called another parallel line of reasoning. Because Time and Rosenbloom shared the "public interest" stipulation as a foundation, the protection they accorded the press in defamation cases involving matters of public interest was very similar to that accorded to the press in false light privacy cases involving matters of public interest. A majority of the Court in Gertz, however, altered the protection given to the press in Rosenbloom by eliminating the public interest test and returning to the determination of the status of the plaintiff.

Since the Court had invalidated Rosenbloom, was the Time public interest stipulation also invalid? None of the opinions in Gertz discussed its impact upon Time, but the underlying rationale of Gertz shows clearly that the Court was thinking solely of defamation in that case. A major reason the Court gave for allowing greater protection from defamation for private individuals rather than public figures in Gertz was that

> public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[141]

While the rebuttal rationale is central to Gertz, the same rationale in privacy cases is ludicrous. It is therefore evident that the Court was not attempting to merge privacy and defamation law in Gertz.

Nonetheless, the majority in Gertz desired to avoid showing preference to either of the competing values. This position raised the possibility that if presented with an appropriate case, the Court would reject the Time public interest test and provide more protection for privacy. As shown above, Cantrell was not the appropriate case because it was decided in a manner that did not directly question the validity of Time.

While Cantrell and Time are both false light cases, they differ in two important factual ways: first, the judge in Cantrell, as opposed to the judge in Time, instructed the jury that liability could be imposed only if actual malice were found;[142] secondly, Cantrell involved egregious, calculated falsehoods.

The element of calculated falsehoods in Cantrell may have led the Court to decide that there was no need to invalidate Time in this case, since the plaintiff's privacy could be protected under the malice requirement of Time. By deciding on the narrow ground, the protections afforded to the press in Time were still valid. While application of the New York Times malice standard in cases of defamation was determined by the status of the defendant, in false light privacy cases it was still determined according to the nature of the message.

Neither was Cox an appropriate case for reconsideration of Time in light of Gertz, because Cox involved the public disclosure aspect of the privacy tort, and not false light. Conceivably, the Court could have created a "Gertz" framework for public disclosure cases: public officials and figures would

have to meet an ill will malice standard (reckless disregard for truth would obviously not apply), while private individuals would be required to meet a less demanding test, such as demonstrating that the "publication would be offensive to a person of ordinary sensibilities."[143]

However, the Court made no distinction between public and private individuals, nor did it address the question of whether "the State may ever define and protect an area of privacy free from unwanted publicity in the press [i.e. limit press freedoms in matters not of public interest] . . . ."[144] Rather, the Court focused on the narrow question this case presented:

> namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records--more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.[145]

The Court based its decision on long-standing principles of privacy law first stated by Warren and Brandeis[146] and reiterated in Tentative Draft No. 13 of the Second Restatement of Torts, "There is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. . . ."[147]

The majority opinion in Cox did not question the conceptual foundation of Time. Only Justice Powell in a footnote in his concurring opinion, noted that the

> Court's abandonment of the "matter of general or public interest" standard as a determinative factor for deciding whether to apply the New York Times malice standard to defamation litigation brought by private individuals. . . calls into question the conceptual basis of Time Inc. v Hill.[148]

Powell, who wrote the majority opinion in Gertz, did not state that Time was invalid, but merely that because of Gertz, Time could be questioned. Though not developed, Powell's statement about Time, when read in the context of his full opinion, implies that in false light cases as in defamation cases, the private individual should be given greater protection than public officials and figures.

However, Powell was not suggesting that the Court merge defamation and privacy law. Much of his opinion argued for recognition of truth as a defense in all defamation actions.[149] Further, he stated that "causes of action grounded in the State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions."[150] In cases in which injuries "are quite different from the wrongful damage to reputation flowing from false statements of fact," such as public disclosure, truth would not be a defense, and "the Constitution may permit a different balance to be struck."[151] His statement indicates that in a future privacy case he would recommend protection for privacy if true statements--not including matters of public record--were of such a private nature as to harm an individual's dignity.

In Cox the Court did not invalidate Time in light of Gertz, nor did it attempt to merge privacy and defamation law. Its approach clearly indicated that it considered the disclosure tort to be distinct from false light privacy cases and defamation cases. As shown in the preceeding section, a majority of the Court in Cox expressed a willingness to provide a more equitable boundary between the competing interests in the press/

privacy area than had been expressed by the majority in Time.

While indicating a shift in the Court's willingness to protect the rights of privacy, the Cox decision is inconclusive on whether the Gertz decision invalidated the conceptual framework of Time. The Court's most recent privacy/press decision, discussed below, rejected the Time standard in appropriation cases, but did not discuss whether Time was also invalid in false light privacy cases.

The Supreme Court and the Human Cannonball

The Supreme Court recently issued a privacy/press decision involving appropriation, which is "quite a different matter from intrusion, disclosure of public facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[152] While Zacchini v. Scripps-Howard Broadcasting[153] involves very different aspects of privacy than the Time, Cantrell, and Cox cases, it was decided by a lower court in a manner that could have resulted in the Supreme Court's clarifying the impact of Gertz on Time.

Hugo Zacchini, a human cannonball, was performing at a county fair in Ohio when his performance was filmed, despite his objections, by WEWS-TV, Cleveland. The film was broadcast by WEWS during its September 1, 1972 eleven o'clock news program, and Zacchini sued Scripps-Howard Broadcasting, owner of WEWS, for invasion of privacy.[154] The trial court granted Scripps-

Howard's motion for summary judgment, and on appeal the Court of Appeals for Cuyahoga County reversed, holding that Zacchini had a cause of action for conversion and invasion of common law copyright.[155]

The Supreme Court of Ohio found that conversion and invasion of copyright were not applicable to this case. This was an appropriation case, and the decisive issue, the Ohio Supreme Court stated, was

> whether the defendant TV station had a privilege to film and televise the plaintiff's performance, on its nightly news program, and if so whether that privilege was abused.[156]

Citing Time, Inc. v. Hill,[157] the Ohio court concluded that the principle of that case "is that freedom of the press inevitably imposes certain limits upon an individual's right of privacy."[158]

Also citing New York Times Co. v. Sullivan,[159] the Ohio court stated that the effect of these two decisions was that the press has a privilege to report on matters of "legitimate public interest even though such reports might intrude on matters otherwise private."[160] In appropriation cases in which the matters are of public interest, the Court held that the privilege could be lost only if the intent of the press "was not to report the performance, but rather to appropriate the performance for some other private use, or if the actual intent was to injure the performer."[161]

Justice Celebrezze, concurring in part and dissenting in part, questioned the Court's reliance on the New York Times and Time decisions. Celebrezze discussed New York Times and

its progeny stating that "the law expressed in Time, Inc. v. Hill. . . must be viewed in light of Gertz v. Robert Welch, Inc.. . ."[162] Celebrezze stated that he believed the Gertz decision would eventually apply to false light privacy. Further, he believed the principles stated in Gertz "effectively supersede the rationale upon which Time, Inc. v. Hill. . . was based, and therefore reliance by the majority upon Time, Inc. v. Hill is misplaced."[163]

On appeal the United States Supreme Court reversed. In an opinion written by Justice White and joined by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist, it held that the Time decision "does not mandate a media privilege to televise a performer's entire act without his consent."[164] Time, Inc. v. Hill,[165] the Court declared, "involved an entirely different tort than the 'right of publicity'. . . ."[166] Thus, the Time public interest standard was inapplicable in appropriation cases.

White was careful to distinguish between appropriation and false light privacy cases. False light cases, he stated, involve reputation and mental distress. In appropriation cases the interest protected "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors. . . ."[167] Further, false light and appropriation cases differ on the extent to which they "intrude on the dissemination of information to the public."[168] White stated:

> In "false light" cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in "right of publicity" cases the only question is who gets to do the publishing.[169]

White added that the Court's Rosenbloom, Gertz, and Time, Inc. v. Firestone[170] decisions do not "furnish substantial support for the Ohio court's privilege ruling."[171] These cases, he carefully noted, "emphasize the protection extended to the press by the First Amendment in defamation cases [emphasis added]. . . when suit is brought by a public official or a public figure."[172] Also citing the Time, Rosenbloom, Gertz, and Firestone decisions, White emphasized that these cases involved the reporting of "events" and not a broadcast of an entire act "for which the performer normally gets paid."[173] The media could report newsworthy facts about Zacchini's act with impunity, but White reiterated the keystone of his opinion:

> Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.[174]

White's opinion is bereft of any consideration of when First Amendment rights might be accommodated differently in appropriation cases. However, he did discuss the importance of protecting a performer from an unauthorized broadcast of an entire performance:

> The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. . . . The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee.[175]

White added that protection of a performer does more than compensate for time and energy invested in an act; "the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."[176]

White's opinion is also bereft of discussion of the impact of the "entire performance" standard on freedom of expression. Justice Powell, however, in a dissenting opinion in which Justices Brennan and Marshall joined, argued that this standard would have a chilling effect on freedom of expression:

> Hereafter whenever a television news editor is unsure whether certain footage received from a camera crew might be held to portray an "entire act" he may decline coverage--even of clearly newsworthy events--or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster.[177]

Powell argued that the First Amendment required a different "analytical starting point" than that used by the majority:

> Rather than begin with a quantitative analysis of the performer's behavior--is this or is this not his entire act?--we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects that station from a "right of publicity" or "appropriation" suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private commercial exploitation.[178]

Powell believed that the "entire performance" standard would present difficulties in future cases "in determining just what constitutes an 'entire act. . . .'"[179]

Justice Stevens also issued a brief dissenting opinion in which he stated it was unclear whether the Ohio Supreme Court was resting its decision on federal constitutional grounds or on common law. He considered the basis of the state court's decision to be "sufficiently doubtful" that he would remand the case to "that court for clarification of its holding before deciding the federal constitutional issue."[180]

By deciding Zacchini on very narrow grounds, the United States Supreme Court did not discuss whether Gertz had invalidated Time in false light cases. Like the Cantrell and Cox decisions, Zacchini was not considered by the majority of the Court to be an appropriate vehicle for a discussion of the impact of Gertz on Time. However, Zacchini is important because it emphasizes the Court's recognition of the value of protecting privacy and the differences between the false light and appropriation aspects of privacy. The Time "public interest" standard is considered by the Court to be inapplicable in areas other than false light. A discussion of whether Time is still valid in false light cases will evidently have to wait until an appropriate false light case comes before the Court.

Conclusion

Justice Harlan's dissenting opinion in Rosenbloom stated:

> Reflection has convinced me that my earlier opinion [in Curtis Publishing v. Butts[181]] was painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area.[182]

Though Harlan has since left the Court and his statement concerns libel, his concern for "more precise balancing" is clearly reflected in the Cox majority's recognition of the need to protect both privacy and freedom of expression.

By rejecting subject matter classifications because they may "too often result in an improper balance between the competing interests," the Gertz Court sought "a more appropriate accommodation between the public's interest in an uninhibited press and its equally [emphasis added] compelling need for judicial redress of libelous utterances."[183] Given the emergence of the Court's concern with "accommodating" values that conflict with freedom of speech, particularly when private individuals are involved, the validity of Time comes into question.

Accommodating competing values is a difficult task, but the Gertz decision and the tone of the Cox decision indicate that the Court has attempted and will attempt to paint with a finer brush.

NOTES

[1]Rosenbloom v. Metromedia, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971), (Harlan, J. dissenting), at 72 n.3.

[2]419 U.S. 245, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974). (Hereinafter cited as Cantrell.)

[3]420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). (Hereinafter cited as Cox.)

[4]385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). (Hereinafter cited as Time.)

[5]For a general study of privacy and the press, see Don R. Pember, Privacy and the Press, (Seattle: University of Washington Press, 1972). Charles Fried's Privacy, 77 Yale L.J. 475 (1968) and Arthur Selwyn Miller's Privacy in the Modern Corporate State, 25 Admin. L.R. 231 (1973) present discussions of the meaning of privacy. Also see Parker, A Definition of Privacy, 27 Rutgers L. Rev. 275 (1974). For a discussion of the Meiklejohn theory as applied in press/privacy cases, see Bloustein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41 (1974).

[6]403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971). (Hereinafter cited as Rosenbloom.)

[7]418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). (Hereinafter cited as Gertz.)

[8]William Prosser's influential article Privacy, 48 Calif. L. Rev. 383 (1960), divided the privacy tort into a complex of four:

1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2) Public disclosure of embarrassing private facts about the plaintiff.
3) Publicity which places the plaintiff in a false light in the public eye.
4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

At 389.

For a critique of Prosser's article see Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962 (1964).

[9]This monograph does not examine all defamation decisions which followed the Time decision. Rosenbloom and Gertz are examined because they are closely related to and may have impact upon the Cupreme Court's privacy/press decisions. See Frakt, The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond, 6 Rutgers Cam. L. J. 471 (1975). Recently the Court reaffirmed Gertz in Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

[10]45 U.S.L.W. 4954 (June 28, 1977). Also see 47 Ohio St. 2d 224, 351 N.E. 2d 454 (1976).

[11]This study does not closely examine the lower court decisions in each of these cases, nor does it examine the theory of the First Amendment in each case. These areas are examined in the larger study stemming from this monograph. Since this study deals with only the privacy/press issue, the reader is referred to other Supreme Court privacy decisions: marital privacy--Griswold v. State of Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); eavesdropping--Katz v. U.S., 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); abortion--Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Also see Doe v. McMillan, 412 U.S. 306, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973), a case involving legislative immunity; and Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), a case involving due process. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) involves a city ordinance which prohibits drive-in theaters from exhibiting films containing nudity. Though Erznoznik involves the First Amendment, it is not discussed here because of its very limited claims on privacy.

[12]A detailed description of the Hills' experience appears in the Supreme Court Record for 385 U.S. 374 (Transcript of Record pp. 20-79).

[13]Sections 50-51. The New York courts have broadly construed the statute to give a right of action in cases where there was material and substantial falsification of facts. See Spahn v. Messner 18 N.Y. 2d 324, 221 N.E. 2d 543 (1966).

[14]The original draft of the Life article stated the play was a "somewhat fictionalized" account of the Hills' experience. See 385 U.S. at 393. In a brief submitted to the Supreme Court, attorneys for Hill contended that "neither the First Amendment nor any other important constitutional interest requires this court to supplant a state rule which, as here, protects persons from deliberately false, injurious works. . . ." 385 U.S. 374, Appellee's Brief at 46.

[15]385 U.S. at 379. In a brief submitted to the Supreme Court, attorneys for Time, Inc. argued that the Court should

extend "general constitutional protection to the press against damage awards. . . under the law of privacy, at least so long as the publication. . . makes some contribution to the dissemination of. . . news." Appellant's Brief at 32.

[16]18 App. Div. 2d 485, 240 N.Y.S. 2d 286 (1963).

[17]15 N.Y. 2d 986, 207 N.E. 2d 604 (1965).

[18]385 U.S. 374.

[19]376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). In the Times decision the Supreme Court prohibited a "public official" from recovering damages for a "defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." At 279-80.

[20]385 U.S. at 387.

[21]Id. at 387-88. For a discussion of lower court privacy/press cases since Time, see Pember and Teeter, Privacy and the Press Since Time, Inc. v. Hill, 50 Wash. L. Rev. 57 (1974).

[22]385 U.S. 374.

[23]See Nimmer, The Right to Speak from Times to Time, 56 Calif. L. Rev. 935 (1968).

[24]Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). See Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, and Bertelsman, The First Amendment and Protection of Reputation and Privacy, 56 Ken. L. J. 718 (1967).

[25]403 U.S. 29.

[26]The police official stated that his definition of obscenity was "anytime the private parts is showing of the female or the private parts is shown of males." Id. at 32 n.4.

[27]The trial judge instructed the jury that as a matter of law, the nudist magazines distributed by Rosenbloom were not obscene. Id. at 36.

[28]Id.

[29]289 F. Supp. 737 (E.D. Penn. 1968).

[30]415 F. 2d 892, at 896 (3rd Cir. 1969).

[31]403 U.S. at 43-44. In an accompanying footnote the plurality stated, "We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest." At 44 n.12.

[32]418 U.S. 323.

[33]"Frame-up: Richard Nuccio and the War on Police," American Opinion, April 1969.

[34]See n.19 supra.

[35]418 U.S. at 329. See 322 F. Supp. 997 (N.D. Ill. 1970).

[36]471 F. 2d 801 (7th Cir. 1972).

[37]418 U.S. at 332.

[38]390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

[39]418 U.S. at 332.

[40]418 U.S. at 349-50. In the sense that "actual malice" must be proven before punitive damages can be awarded, New York Times does apply to private individuals under Gertz. See Brosnahan, From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment, 26 Hastings L. J. 777 (1975).

[41]385 U.S. 374.

[42]See Beytagh, Privacy and a Free Press: A Contemporary Conflict in Values, 3 N.Y.L.F. 453 (1975) at 478. Nimmer, supra, n.23 asks, "Was the Court right in drawing the definitional balance line for privacy in approximately the same place that it drew the line for defamation? I think the Court was in error, and that the error derives from the superficial similarity between defamation and the particular form of privacy invasion presented by the Time case." At 956-957.

[43]42 L. Ed. 2d 419.

[44]"Legacy of the Silver Bridge," The Plain Dealer Sunday Magazine, Aug. 4, 1968, at 32.

[45]42 L. Ed. 2d at 426. The Supreme Court believed that the District Judge was referring to the common law standard of malice and not the New York Times actual malice standard. At 427. The District Judge also dismissed the actions of three of the Cantrell children.

[46]484 F. 2d 150 (6th Cir. 1973). The Court of Appeals also concluded that there was insufficient evidence to find that the

photographer, Conway, had portrayed the Cantrells in a false light. The Supreme Court agreed on this point, 42 L. Ed. 2d at 427, n.5.

[47]42 L. Ed. 2d at 428.

[48]Id. at 427. Forest City Publishing Co. was also found liable under the doctrines of respondeat superior. Id. at 428.

[49]The District Judge instructed the jury in part: "The constitutional protection for speech and press preclude redress for false reports of matters of public interest in the absence of proof that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth." Id. at 425 n.3. Compare Time, Inc. v. Hill, 385 U.S. 374 at 394-95.

[50]42 L. Ed. 2d at 426.

[51]43 L. Ed. 2d 328.

[52]The Court might have also addressed the press/privacy conflict in another case considered during the 1974-1975 term, Roe v. Doe, 42 A.D. 2d 559, 345 N.Y.S. 2d 560 (1st Dep't 1973), aff'd mem., 33 N.Y. 2d 902, 307 N.E. 2d 823, 352 N.Y.S. 2d 626 (1973), cert. granted, 417 U.S. 907, 94 S. Ct. 2601, 41 L. Ed. 2d 210 (1974). The case involved a preliminary injunction restraining the distribution of a book written by a psychiatrist, which related the case history of a former patient. In addition to the privacy issue, this case involved prior restraint and physician-patient privilege. After hearing argument on December 18, 1974, the Supreme Court dismissed the writ of certiorari as improvidently granted on February 19, 1975. 420 U.S. 307, 95 S. Ct. 1154, 43 L. Ed. 2d 213 (1975). See Note: Roe v. Doe: A Remedy for Disclosure of Psychiatric Confidences, 29 Rutgers L. Rev. 190 (1975).

[53]Attorneys for Cox, in a Reply Brief filed after the Gertz decision, argued that Gertz did not apply in this case. See Cox Broadcasting v. Cohn, 43 L. Ed. 2d 328, Reply Brief of Appellants pp. 21-22, n.44.

[54]Georgia Code Ann. Section 26-9901. Wisconsin (Wis. Stat. Ann. Section 942.02), Florida (Fla. Stat. Ann. Sections 794.03, 794.04), and South Carolina (S.C. Code Section 16-81) have similar statutes.

[55]Wassell believed that the name had been released prior to the broadcast. See Cox Broadcasting v. Cohn, 43 L. Ed. 2d 328, Affidavit of Thomas Wassell in Opposition to the Plaintiff's Motion for Summary Judgment (Aug. 14, 1972).

[56]43 L. Ed. 2d 328 at 337.

[57]231 Ga. 60, 200 S.E. 2d 127 (1973).

[58]231 Ga. at 68-69.

[59]43 L. Ed. 2d at 350. The Court also stated, "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." At 350.

[60]Id. at 349. The Court recently denied certiorari to a case involving public disclosure of private facts that were not a matter of public record, Virgil v. Time, Inc., 527 F. 2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998, 96 S. Ct. 2215 (1976). The case involved a Sports Illustrated article on body surfing which described several bizarre non-surfing incidents in one surfer's life. It presented the following questions to the Supreme Court: "1. What is standard of constitutional protection for truthful public disclosure of private facts? 2. Is application of such standard question of law or question of fact?" 44 U.S.L.W. 3551. Justices Brennan and Stewart would have granted certiorari.

[61]385 U.S. 374.

[62]43 L. Ed. 2d 328.

[63]385 U.S. 374.

[64]Id.

[65]Id. at 388. Brennan added that a "broadly defined freedom of the press assures the maintenance of our political system and an open society." At 389. See Bloustein, supra n.5.

[66]Id. at 388-89, 4 Elliot's Debates on the Federal Constitution 571 (1876 ed).

[67]Id. at 388. New York Times Co. v. Sullivan, 376 U.S. at 271-72. Brennan also stated that the "constitutional guarantees [of freedom of the press] can tolerate sanctions against calculated falsehood without significant impairment of their essential function." Id. at 389.

[68]The Court was clearly concerned about self-censorship: "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer. . . wider of the unlawful zone'. . . ." Id. at 390.

[69]385 U.S. at 402 (Douglas, J. concurring). Douglas in particular believed that narrowing the ambit of the First Amendment made a "chilling effect" on free expression possible. Id. at 401.

[70]Id. at 401. (Black, J. concurring). Justice Douglas joined Black's concurring opinion and also issued a separate concurring opinion.

[71]Id. at 400. Black added, "The 'weighing' doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press." At 399.

[72]Id. at 401 (Douglas, J. concurring).

[73]Id.

[74]Id. at 409 (Harlan, J. concurring in part, dissenting in part). Citing a negligence standard in libel (Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933)), Harlan stated, "The press should not be constitutionally insulated from privacy actions brought by parties in the position of Mr. Hill when reasonable care has not been taken in ascertaining or communicating the underlying facts. . . ." At 409 n.6.

[75]Id. at 407. Compare the distinction Harlan draws between public and private individuals, at 408-9, with Gertz 418 U.S. 323, at 344-45.

[76]Id. at 410.

[77]Id. at 412 (Fortas, J. dissenting).

[78]Id. at 411.

[79]Id. at 420.

[80]385 U.S. 374.

[81]Beytagh, Supra n.42, at 465.

[82]403 U.S. 29. Justice Douglas did not participate in the consideration or decision of this case.

[83]Id. at 43, quoting New York Times Co. v. Sullivan, 376 U.S. at 270-71. The emphasis was added in the Rosenbloom decision.

[84]376 U.S. 254.

[85]403 U.S. at 49-50. Calculated falsehoods, however, were not protected. See Garrison v. Louisana, 379 U.S. 64, 85 S. Ct. 209 (1964) 13 L. Ed. 2d 125.

[86]403 U.S. at 57 (Black, J. concurring). See also his concurring and dissenting opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, at 172.

[87]403 U.S. at 59 (White, J. concurring).

[88]Id. at 60.

[89]Id. at 66 (Harlan, J. dissenting).

[90]Id. at 64. Also see the distinction drawn between public and private individuals, at 70.

[91]Id. at 78 (Marshall, J. dissenting). Marshall was quoting Justice Stewart's concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).

[92]Id.

[93]Id. at 86.

[94]Id. at 84. Marshall also foreshadowed the Gertz decision, arguing that strict liability was impermissable. At 86-87.

[95]418 U.S. 323.

[96]Id. at 347-48. There was also a change in the composition of the Court. Between Rosenbloom and Gertz, Black and Harlan left and were replaced by Powell and Rehnquist.

[97]Id. at 342.

[98]Id. at 341.

[99]Id. at 346.

[100]Id. at 353 (Blackmun, J. concurring).

[101]Id. at 354.

[102]Id. "If my vote were not needed to create a majority, I would adhere to my prior view." At 354.

[103]Id. at 355 (Burger, C. J. dissenting).

[104]Id. at 356 (Douglas, J. dissenting).

[105]Id. at 361 (Brennan, J. dissenting). Rosenbloom, he stated, struck the proper accommodation between "avoidance of media self-censorship and protection of individual reputations . . . ." At 361.

[106]Id. at 370 (White, J. dissenting).

[107]Id. at 403.

[108]Id. at 400.

[109]Id. at 370.

[110]Id. at 400.

[111]Id. at 347-48. Because of the propensity of juries in the 1960s to award staggering punitive damages (Rosenbloom is an example), the Gertz barrier to punitive damages is in favor of the press. By requiring proof of actual damages, with the punitive requirement, the Court may have been trying to deter litigation and decrease self-censorship. However, the private individual has substantially greater opportunity for recovery under Gertz than under Rosenbloom.

[112]42 L. Ed. 2d 419.

[113]Id. 426.

[114]Much of the opinion is a discussion of "actual malice" and "common-law malice." Id. at 425-27.

[115]See Garrison v. Louisiana 379 U.S. 64.

[116]See n.49 supra.

[117]42 L. Ed. 2d at 429 (Douglas, J. dissenting).

[118]43 L. Ed. 2d 328.

[119]Significant problems barring a decision for Cohn were that the individual whose privacy was directly invaded was deceased, and that Cynthia Cohn's identity as a rape victim was a matter of public record.

[120]New York Times v. Sullivan, 376 U.S. 254, and Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

[121]43 L. Ed. 2d at 347.

[122]Id. at 345.

[123]Id. at 346.

[124]Id. at 347.

[125]See n.59 supra.

[126]Id. at 353 (Douglas, J. concurring).

[127]Prosser, supra n.8 at 400. See 398 for comments on public disclosure. Prosser posed the question of whether false light privacy "is not capable of swallowing up and engulfing the whole law of public defamation. . . ." At 401.

[128]385 U.S. 374, at 384 n.9.

[129]383 U.S. 75, 92, 86 S. Ct. 669, 15 L. Ed. 597 (1966), (Stewart, J. concurring).

[130]Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Also see Kalven, Privacy in Tort Law--Were Warren and Brandeis Wrong? 31 Law and Contemp. Prob. 326 (1966), and Bloustein, Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well? 46 Texas L. Rev. 611 (1968).

[131]385 U.S. at 391.

[132]Justice Harlan stated in his separate opinion in Time that in libel as well as privacy cases "the opportunity to rebut may be limited by fear of reiterating" the false allegations. Id. at 408, n.5 (Harlan, J. concurring in part, dissenting in part).

[133]418 U.S. 323, at 334, n.6.

[134]385 U.S. at 390-91. Nimmer, supra n.23, stated that if "the untrue statements in false light privacy cases are necessarily reputation injuring, then the Time decision was correct . . ." in applying the New York Times standard. At 963. Nimmer believed privacy protects "not reputation, but the interest in maintaining the privacy of certain facts." At 958. He felt that the Court failed to recognize this in Time, and hence, the application of the New York Times malice standard was incorrect. He argued that false light cases are logical extensions of private facts (disclosure) cases, and it was fallacious to equate false light with defamation. At 963.

[135]385 U.S. at 388-89. Also see Bloustein, supra n.5.

[136]See Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D.S.C. 1969), Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A. 2d 899 (1971), Kent v. Pittsburgh Press, 349 F. Supp. 622 (W.D.Pa. 1972), and Varnish v. Best Medium Publishing, 405 F. 2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987, 89 S. Ct. 1465, 22 L. Ed. 2d 762 (1969) for an application of Time to false light cases.

[137]Warren and Brandeis, supra n.130, at 214.

[138]403 U.S. 29, at 31, n.2.

[139]Warren and Brandeis, supra n. 130, at 214.

[140]403 U.S. at 46.

[141]418 U.S. 323, at 344. The Court also realized that "an opportunity for rebuttal seldom suffices to undo harm from

defamatory falsehood." At 344 n.9. Compare Rosenbloom, 403 U.S. 29, at 46.

[142]See n. 49 supra.

[143]43 L. Ed. 2d 328, at 346. This would draw upon one of the distinctions made in Gertz between public and private individuals: the public individual runs the "risk of closer public scrutiny." At 344.

[144]Id. at 347.

[145]Id.

[146]Supra n.130 at 216-17.

[147]Section 652D, Comment c at 114. Compare Briscoe v. Reader's Digest 93 Cal. Rptr. 866, 483 P. 2d 34 (1971).

[148]43 L. Ed. 2d 328, at 351, n.2 (Powell, J. concurring).

[149]Id. at 351-52. He was responding to the majority's statement at 347 that whether truth was a defense in a defamation action brought by a private person was an "open" question.

[150]Id. at 352.

[151]Id.

[152]Prosser, supra n. 8, at 406.

[153]45 U.S.L.W. 4954.

[154]Section 652C, Tentative Draft No. 13 of the Second Restatement of Torts (1967) states, "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." This aspect of privacy has been termed "the right of publicity." See Nimmer, The Right of Publicity, 19 Law and Contemp. Prob. 203 (1954), and Comment: Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild, 22 U.C.L.A. L. Rev. 1103 (1975).

[155]See 351 N.E. 2d 454, at 456-57.

[156]Id. at 460.

[157]385 U.S. 374.

[158]351 N.E. 2d at 460.

[159]376 U.S. 254.

[160]351 N.E. 2d at 461.

[161]Id. "It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between plaintiff and a third person to present the performance to the public. . . ." At 461.

[162]Id. at 463 (Celebrezze, J. concurring in part, dissenting in part).

[163]Id. at 464.

[164]45 U.S.L.W. at 4956.

[165]385 U.S. 254.

[166]45 U.S.L.W. at 4956.

[167]Id. at 4957.

[168]Id.

[169]Id.

[170]96 S.Ct. 958 (1976). This decision reaffirmed the Court's position in Gertz.

[171]45 U.S.L.W. at 4957.

[172]Id.

[173]Id.

[174]Id.

[175]Id.

[176]Id.

[177]Id. at 4958-59 (Powell, J. dissenting).

[178]Id. at 4959.

[179]Id. at 4958 n. 1.

[180]Id. at 4959 (Stevens, J. dissenting).

[181]388 U.S. 130.

[182]403 U.S. 20, at 72 n. 3 (Harlan, J. dissenting).

[183]Time, Inc. v. Firestone, 96 S.Ct. 958, at 966.